Editor's note: Reconsideration denied by order dated Oct. 12, 1973; Appealed -- dismissed, sub nom. Pashayan v. Morton, Civ. No. F-74-5 E.D. Calif. April 24, 1974), dismissed, No. 74-1083 (9th Cir. 1974)

MONTURAH COMPANY

IBLA 72-443 Decided May 3, 1973

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying the reinstatement of oil and gas lease U-0140571 terminated by operation of law for failure to pay the annual rental on or before the anniversary date.

Affirmed.

Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

> An oil and gas lease terminated by operation of law for failure to timely pay the advance rentals can only be reinstated when the lessee shows that his failure to pay the rental on or prior to the anniversary date was justifiable or not due to a lack of reasonable diligence.

APPEARANCES: Charles S. Pashayan, Esq., for appellant.

OPINION BY MR. HENRIQUES

Monturah Company appeals from a decision of the Utah State Office refusing to grant the reinstatement of its oil and gas lease, U-0140571, terminated by operation of law for failure to pay the annual rental on or before the due date.

The rental was due on or before May 1, 1972. It was not received until May 3, 1972. Thus, under the provisions of section 31 of the Mineral Leasing Act, 30 U.S.C. § 188, the lease terminated by operation of law. The envelope in which the payment was sent was postmarked May 1, 1972, the due date, in Fresno, California. Although originally, appellant contended that the payment was sent earlier, it now concedes that in point of fact the rental was not mailed until the due date.

It is clear, therefore, that reasonable diligence was not shown by appellant, and the major issue in this case is whether the failure to timely pay the advance rental was "justifiable" within the meaning of section 31 of the Mineral Leasing Act, as discussed in Louis Samuel, 8 IBLA 268 (1972), and R. G. Price, 8 IBLA 290 (1972).

In order to decide this issue, a review of the factual construct of the case is in order. At the direction of the managing officer of the Monturah Company a check in payment of the lease was prepared on April 28, 1972. The envelope containing this check was correctly addressed to the Bureau of Land Management, Salt Lake City, Utah, and placed in the out box for mailing. The office clerk in charge of the mail pickup was not at work on that day, however, as she had suffered an injury to her shoulder the previous evening. The mail clerk's supervisor was, on that day, supervising an inventory at different premises. The mail clerk's supervisor was advised on the morning of the 28th of the clerk's injury, at which point he called the office to advise them that the mail clerk would not be at work and "to make certain her duties were fulfilled." The envelope, however, was not posted on April 28, a Friday. This fact of non-mailing was not discovered until Monday, May 1, the due date.

Appellant contends that these circumstances make its failure to timely pay the annual rental "justifiable." We disagree. It is admitted that the responsible officer of the company knew that the mail clerk was absent, and further that he specifically directed someone else to perform her duties. The duties, however, were neglected. Appellant is in no stronger position than if the assigned mail clerk had inadvertently neglected to collect the mail while at work. As this Board declared in Louis Samuel, supra, when it was discussing the scope of the reinstatement provisions of section 31, as they relate to the meaning of the word "justifiable" as used in the statute: "What is clearly not covered are cases of forgetfulness, simple inadvertence or ignorance of the regulations * * *."

Companies are not held to a higher standard of diligence by the mere fact of their corporate structure. But by the same token, they cannot hide behind the bulk and complexity of their organizations, so as to make "justifiable" for them actions which would not be held to be justifiable for individual lessees.

We note that the dissent emphasizes at length that various statements were made under penalty of perjury. The inference is that this Board should accept them as true. In fact, we do. The decision in this case is premised not on a doubt of the veracity of appellant's representatives, but rather on the basis that, accepting as true all of their statements, the failure to timely pay the annual rental was not "justifiable."

The dissent also misreads the "reasonable diligence" requirement as spelled out both in 43 CFR 3108.2-1 (c) and Louis Samuel, supra. The regulation states that:

> Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment.

In Louis Samuel, supra, this Board declared:

> The effect of this new regulation is that when lessees can show that they mailed the payment in sufficient time so that in the normal course of events it would be received on or prior to the due date, they may be granted reinstatement provided that they make timely application as required by the statute.

Id. at 273.

The dissent quotes Louis Samuel, supra, to the effect that "[t]he meaning of 'reasonable diligence' is 'what action a reasonably diligent person would take.'" The full sentence reads "Indeed, the reasonable diligence requirement is primarily an objective test dependent not upon the personal situation of the lessee, but upon what action a reasonably diligent person would take." Id. at 273 (emphasis added). What it means is that the simple question to be answered in any case to determine whether "reasonable diligence" has been shown is whether the lessee mailed the payment in sufficient time so that in the normal course of events the payment would be timely received. This is the interpretation that has consistently been followed by the Department. See e.g., R. G. Price, supra; Charles E. Reynolds, 9 IBLA 300 (1973); John Rusiniak, 10 IBLA 74 (1973); Mrs. Charles H. Blake, 10 IBLA 175 (1973).

Thus, the factors which the dissent discusses have no bearing on the issue of reasonable diligence but are instead relevant to a determination of whether the failure to exercise due diligence can be deemed "justifiable." For the reasons discussed above, we do not feel that the failure can be deemed "justifiable" within the meaning of section 31 of the Mineral Leasing Act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

I concur:

Martin Ritvo, Member.

I dissent:

Anne Poindexter Lewis, Member

Anne Poindexter Lewis, dissenting.

For the reasons stated below, I would accept the late payment of rental herein under the exception provided for in the Mineral Leasing Act, 30 U.S.C. § 188(c), and would reinstate oil and gas lease U-0140571.

The record shows that the rental was due on or before May 1, 1972. It was in fact postmarked May 1 and was received on May 3, 1972.

Charles S. Pashayan, a partner and the general manager of appellant company, filed a signed statement dated November 27, 1972, declaring the following under penalty of perjury: Three related corporations, including appellant, have business activities at one address, 565 Broadway, Fresno, California, and during April and May 1972, there were approximately 127 full-time employees employed by the two corporations other than appellant. On April 28, 1972, Mr. Pashayan drew and signed a check to the Bureau of Land Management for the payment of the 1972-1973 rent, check no. 1747, in the amount of $320. He instructed his secretary, Winnie M. Burns, that the check was to be mailed forthwith. The policy of the office was that all checks and correspondence would be mailed on the day written. April 28 was a Friday. Sometime after Monday, May 1, he became aware that Celeste Mattos, the girl whose duty it was to pick up the mails, had injured her shoulder on the evening of April 27 and was not at work on April 28. In a separate similar signed statement dated November 28, 1972, Mr. Pashayan declared he deposited $1000 to the account of appellant company on April 28 so that there would be sufficient funds to cover the check for rental.

Winnie M. Burns in a signed declaration under penalty of perjury, dated November 27, 1972, stated: She was secretary to Mr. Pashayan and as such drew all the checks for him on the company, and on April 28, she remembered drawing a check for $320 to BLM for the payment of rent due May 1, 1972. She prepared and addressed an envelope and placed the check in it, and placed the envelope in the outgoing mailbox. The standard procedure was that letters would be picked up and run through the postage machine on the day she placed the envelope in the outgoing mail. After May 1, she found out that the mail girl, Celeste Mattos, had sprained her shoulder the evening of April 27 and, unknown to Ms. Burns, someone else was put in charge of the mail. Ms. Burns was never instructed by anyone to hold the check.

Celeste Mattos, under penalty of perjury, in a written statement dated November 27, 1972, said: During the month of April 1972

and until about October 1972, one of her duties was to pick up all the mail that was to be mailed, put it through the postage machine, and mail it the same day. During the evening of April 27, she sprained her shoulder and went to St. Agnes Hospital for emergency treatment and next returned to work on May 4.

William C. Kerr, in a signed written statement dated November 28, 1972, under penalty of perjury, declared: He is the office manager of two related corporations at the same address as appellant, and that as such, he installed the office routine in effect April and May 1972. The mail was to be picked up by Celeste Mattos between 4 and 4:15 p.m., put through the postage meter, and mailed that day. On April 28, he spent the entire day in the warehouse taking inventory and was not in appellant's office at 565 Broadway, Fresno, California. Early on April 28, he received a call advising him Celeste Mattos had injured her shoulder and would not be at work. He called the office and told them Mattos would not be at work and advised them to make certain her duties were filled. He was not aware until after May 1 that all the mail was not handled pursuant to established office procedure. He has attempted to find out why the letter to BLM was not mailed according to usual office procedure, which would have been April 28. The only conclusion he can arrive at is that in view of Celeste Mattos' emergency absence the established office procedure broke down.

Louis Samuel, 8 IBLA 268 (1972), interprets the here involved section of the Mineral Leasing Act, supra, thus: The meaning of "reasonable diligence" is "what action a reasonably diligent person would take." "Justifiable" means "a limited number of cases where, owing to factors ordinarily outside of the individual's control, the reasonable diligence test could not be met."

In the instant case, I believe the appellant met the definition of "reasonable diligence" set forth in the Samuel case. 1/ Moreover, I do not agree with Samuel that "justifiable" means only factors outside an individual's control, such as earthquake, fire, etc., and thus is an overly rigid and stringent test. Rather, I believe, "justifiable" is something akin to "reasonable diligence," and is a bona fide, sufficient, reasonable excuse for the failure to send the rental timely. Appellant made every reasonable effort to mail the check but an unforeseen and even unknown breakdown in its office procedures prevented the timely mailing of the check. Therefore, its failure to send the rental timely, in my opinion, was also "justifiable." I further repeat here the thought expressed in the dissent in Louis J. Patla, 10 IBLA 127 (1973), in which I joined. This is the concept that the section of the Mineral Leasing Act at 30 U.S.C. § 188(c) was intended to be remedial and for the benefit of lessees.

1/ See R. G. Price, 8 IBLA 290 (1972).

Therefore, it should be given a liberal construction. See Attix v. Robinson, 155 F. Supp. 592 (D.C. Mont. 1957); see also 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5701 (1943). Cf. Lance v. Udall, Civil No. 1864-N, January 23, 1968 (D.C. Nev.).

In conclusion I believe that the representatives of appellant in the present case acted as reasonably diligent persons would act and, further, that its failure to send in the rental timely was justifiable in the sense that there was a reasonable, bona fide, sufficient excuse for the delay. Accordingly, I would reinstate the lease.